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In the Supreme Court of the United States

No. 79-260

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
PETITIONER

v.

STATE OF IDAHO, ET AL.

THE STATE OF IDAHO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Carey Act, as amended, 43 U.S.C. § 641, and subsequent enactments, conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement, which Idaho cannot be deprived of if it meets the conditions of the Carey Act and reclaims the desert lands.

STATUTES INVOLVED

The Carey Act of August 18, 1894, Ch. 301, § 4, 28 Stat. 422, 43 U.S.C. § 641, cited fully in the Petitioner's Brief for Certiorari at 2.

The Act of March 15, 1919, Ch. 96, 36 Stat. 237, 43 U.S.C. (1970 ed.) § 643, cited fully in the Petitioner's Brief for Certiorari at 4.

The Act of June 11, 1896, Ch. 420, § 1, 29 Stat. 434, 43 U.S.C. § 642 provides:

> Under any law heretofore enacted by any State providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section 641 of this title, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other authority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such State without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part.

STATEMENT

Respondent accepts in part the statement in the government's petition, but submits the following additional information:

1. *History of the Carey Act*

In addition to the amendatory statutes cited by the government, it is also important that in 1896, just two years following the enactment of the Carey Act, the Congress amended the Act to permit the states to obtain liens against the land being reclaimed for the actual cost

of irrigation systems and reasonable interest. See Act of June 11, 1896, Ch. 420, § 1, 29 Stat. 434, 43 U.S.C. § 642. This subsequent Congressional enactment specifically recognized that the Carey Act had made a *conditional grant* of lands to the states:

> Under any law heretofore or hereafter enacted by any state, providing for the reclamation of arid lands, *in pursuance of and acceptance of the terms of the grant made in Section 641 of this title,* . . . . [Emphasis added] 43 U.S.C. 642.

This intent of Congress that the Carey Act be a grant of lands is evident from the Congressional history of the Act.

The Carey Act was one of several federal programs enacted in the late 1800's to encourage the settlement and reclamation of the vast federal lands in the western United States. Unlike other land grant legislation such as the Desert Land Act, 43 U.S.C. §§ 321-339, Homestead Act, 43 U.S.C. §§ 161-302 and Timber and Stone Act, 43 U.S.C. §§ 311-313 (repealed 1955), in which the federal government dealt directly with each settler, the Carey Act was an effort to involve the individual states in reclamation programs and have them initiate and supervise the settlement of desert lands. It represented a compromise between that faction of Congress that wanted the federal government to control the reclamation and take complete responsibility for the development of the public domain and those advocating an unconditional grant of land to the states. The proponents of the Carey Act felt that given a chance, states working in conjunction with private interests could best accomplish the purpose of reclaiming arid western lands

without federal reclamation laws. 26 Cong. Rec. 8429-8431 (1894). The states were to be given a definite entitlement to the desert lands. However, to avoid speculation and misdealing, the federal government was to retain title until the states had met the conditions of the Carey Act and had actually performed the reclamation work. There was never any doubt that once the states performed their part of the bargain, the federal government was legally obligated to issue patents. The states were protected with a permanent entitlement to lands, but the United States retained the power to refuse to issue patent until the states complied with the terms of the Act and irrigated the lands.

2. *The Case Below*

In both the district court and the circuit court, the Interior Department not only argued that the state had no enforceable entitlement under the Carey Act, it also argued that a married woman could not make her own entry under the Carey Act and that a home built on the dividing line between entries could not qualify as a residence for both entries. Both courts below ruled against the government on these issues, primarily on constitutional grounds. The United States has now decided not to seek certiorari on either of these issues. The petition for certiorari is therefore limited solely to the question of whether the Carey Act granted any enforceable entitlement to the State of Idaho with respect to irrigable desert lands.

In reviewing the decision of the district court, the petition for certiorari failed to disclose that while the courts found that the State of Idaho had an entitlement to 3 million acres of irrigable desert lands, it also did not bar the government from proceeding to classify and use

federal lands which were suitable for Carey Act entry. In fact, the court specifically provided that the Secretary could withdraw lands for valid purposes and that the state's remedy was to request reclassification of the lands for Carey Act entry (Petitioner's Brief for Certiorari, Appendix A at 19a):

> The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act. *To the extent the land has been withdrawn for other purposes by the Secretary and the State remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry.* The Secretary may not arbitrarily deny the State's application for reclassification, withdrawal and Carey Act segregation. The Secretary's ruling, once final, is reviewable under the standards set forth in *Bronken v. Morton,* 473 F.2d 790 (9th Cir. 1973), *cert. denied,* 414 U.S. 828, 94 S. Ct. 51, 38 L.Ed.2d 62 (1973), *Richardson v. Udall,* 253 F. Supp. 72 (D.C. Idaho 1966), and the Administrative Procedure Act, 5 U.S.C.A. § 706. Such a construction of the Carey Act is consistent with 43 U.S.C.A. 315f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant. *See, Bleamaster v. Morton,* 448 F.2d 1289 (9th Cir. 1971). The Court does not accept the State's argument that it is absolutely entitled to select *any* land on the public domain for Carey Act development, for such a construction does not comport with the wording of the Act, its legislative history, other acts of Congress regarding the public domain, as

> well as the broad discretion invested in the Secretary of the Interior as manager of the public domain. [Emphasis added]

REASONS FOR DENYING THE PETITION

I

THE NINTH CIRCUIT COURT OF APPEALS AND THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF IDAHO CORRECTLY AND APPROPRIATELY DECIDED THIS CASE

Contrary to the assertions of the United States there is no overriding national policy requiring review of the decisions of the lower courts in this case. The principal effect of the Carey Act is in the Ninth Circuit, and while there are some potentially irrigable lands in the Eighth and Tenth circuits, the issues presented here are predominantly Ninth Circuit issues. *Accord,* Petitioner's Brief for Certiorari at 17.

The United States in the Petition for Certiorari implies that the land amounts sought by Idaho are large and will have a disastrous effect upon the ability of the Secretary to manage the public lands. This is untrue. The decision reached by the Appellate and District Court reflects the goals of the Carey Act as established by Congress. In fact, the Appellate and District Courts reach the central issue avoided by the United States, namely that the administrative plans for the public lands established by the Department of the Interior are contrary to congressional will and interest. That is, Congress through the Carey Act made a conditional grant of lands to the desert land states, which grant is not subject

to defeat by the general desire of the Interior Department not to allow Carey Act entries.

A. The Language of the Carey Act Creates a Grant of Federal Lands to the State of Idaho.

The Carey Act is not a legislative authorization permitting the Secretary of the Interior to make desert lands available for settlement and patent at a future date only if such entries are compatible with recent policy changes within the Interior Department. The Carey Act is by its terms an absolute grant of federal lands to the public land states. The states are invited to accept the grant by contract and to proceed to identify and reclaim the desert lands. If they do so, the Secretary of the Interior is directed to issue a patent to the state. The language of the statute is mandatory and speaks in terms of a grant, which must be performed if the states meet the conditions of the statute:

> [T]he Secretary of the Interior with the approval of the President is, as of August 18, 1894, authorized and empowered upon proper application of the State to contract and agree, from time to time, with each of the states in which there may be situated desert lands . . . *binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands* . . . .
>
> * * * *
>
> *As fast as any state may furnish satisfactory proof* according to such rules and regulations as may be prescribed by the Secretary of the Interior, *that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the state or its assigns* . . . . [Emphasis added] 43 U.S.C. § 641.

Commentators have noted that the nature of the Carey Act is to create a contract between the federal

government and the states. The Carey Act has been denominated a contractual offer by the federal government to donate and grant certain lands, which offer had to be accepted by the states to become effective. Once accepted, the offer created a contractual obligation binding upon both the state and the federal government. III *Kinney On Irrigation and Water Rights* § 1325 (2d ed. 1912) states:

> *Acceptance of the grant made by the Carey Act by the States named.* The first step to be taken by a State which wishes to avail itself of the benefits of the grant made by the Carey Act of the one million acres of land is to accept the terms of the grant and to provide for the machinery for the reclamation of the land. The power of the State is limited to the acceptance of the offer of the United States, and the execution of the trust assumed by the acceptance thereof. Now this acceptance can only be made by an Act of the legislature, in the exercise of its power, and in order to make such acceptance effective.

The State of Idaho accepted the offer of the federal government in 1895, and a binding contract was created:

> *Idaho Code* § 42-2001. *Acceptance of the Carey Act.* The State of Idaho accepts the conditions of Section 4 of an act of congress, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1894, and for other purposes," approved August 18, 1894, and the acts amendatory thereof, together with all the grants of land to the state under the provisions of the aforesaid act and its amendments.

The language of the Carey Act, contrary to the petitioner's implication, is unequivocal.

B. The Legislative History of the Carey Act Reveals That Congress Intended to Grant and Donate Desert Lands to the States Conditional Only on the State's Reclamation and Settlement of the Lands.

Contrary to the assertions of the United States, the legislative history and subsequent amendments to the Carey Act established that while an outright grant of possession was not made, the United States did *agree to grant lands to the states* if the states complied with the provisions of the Act and actually reclaimed the lands and placed settlers on the lands.

The Congressional Record reveals that the original Carey Act arose from the adoption of a House amendment replacing an earlier Senate bill introduced on the matter. 26 Cong. Rec. 8388 (1894). A look at the Congressional Record establishes five major points concerning the Carey Act: First, the Senate bill did not constitute an outright appropriation to the states. *Id.* Second, the Senate Bill allowed the states to select desert lands and reserve them for five years, but patent was not issued to the states until they irrigated and reclaimed the lands and located actual settlers upon them. *Id.* Third, the House amendment was adopted and became the original Carey Act. The House amendment is very similar to the Senate bill, but deleted the provisions which allowed the states to reserve the lands for up to five years after selection while they attempted reclamation. *Id.* at 8389. Fourth, the House members were very concerned that title to the desert lands not pass to the states until the lands had been reclaimed and actual settlers located upon them. Since Congress had made outright grants of other lands and had been highly

criticized because of resulting speculation, the House amendment was designed to make certain that title to the land did not pass to the states until the provisions of the Act concerning reclamation and settlement had been met. *Id.* at 8388-8394. Fifth, all of the Congressmen understood that although the states were not getting an outright appropriation of identifiable land, they were being given a "donation" of land, with title to pass upon reclamation of the land by the state and the settlers. There is no discussion whatsoever of discretion being granted to the Secretary. In fact, the Congressmen assumed that the patent to the lands would be delivered promptly to the states as soon as they reclaimed the lands. *Id.*

Further evidence of congressional intent to "donate" lands to the western states is found in the legislative history. Appendix A contains selective portions of that history.

C. Federal and State Courts Have Continually Found That the Carey Act Constituted a Conditional Grant to the Public Land States.

While the United States asserts that the long standing policy of the Interior Department has not changed, the interpretation given to the Carey Act by Federal and State courts is contrary to that now offered by the United States.

This Court in 1923 recognized that the United States had obligated itself to transfer desert lands to the State of Idaho by contract and that the Secretary of the Interior has no discretion to deny patents once the conditions of settlement and reclamation are met.

> By the Carey Act the United States binds itself to donate, grant and patent to a state, complying with stated conditions, desert lands, which the state may cause to be irrigated, reclaimed and occupied. The state is required to file a map of the land proposed to be irrigated, showing the plan of irrigation, etc., and is authorized to make contracts, to cause the land to be reclaimed, and to induce their settlement and cultivation. *Upon satisfactory proof* the Secretary of the Interior *is directed to issue patents* to the State of its assigns. *Idaho Irr. Co. v. Gooding,* 256 U.S. 518, 521 (1923). [Emphasis added]

The Federal District Court for Idaho in 1933 found that the Carey Act constituted a grant of lands to the states to be accepted by complying with the conditions of the Act. *Twin Falls Land and Water Co. v. Twin Falls Canal Co.,* 7 F. Supp. 238 (D. Idaho, 1933). Here the court stated:

> In 1894 by the passage of the Carey Act a new policy to effectuate the reclamation of the desert lands of the arid West was initiated by the Congress. Title 43, USCA, Sec. 641 et seq. By its terms, as an aid to the cultivation of tracts upon such arid regions, the United States *offered to grant to states complying with the requirements* of the enactment, large bodies of desert land. *This statutory offer was formally accepted by the State of Idaho,* which laid down an elaborate and carefully guarded method of procedure for persons desiring to construct such projects and for settlers thereon. 7 F. Supp. at 240. [Emphasis added]
>
> The State of Idaho in its sovereign capacity was interested in the development of prosperous communities upon desert lands within its boundaries. It has adopted a code, intricate in detail and various in

> ramification to protect that resource. Pursuant to this policy and with the beneficient purpose of utilizing this resource upon the "Great American Desert" the legislation, state and national, heretofore adverted to, was enacted. 7 F. Supp. at 245.

Contemporary statements by state jurists also reflect the understanding that the Carey Act constituted a conditional grant to the states. The statements of the Supreme Court of Montana in two early cases demonstrate the public understanding existing in the 1890's that the federal government had indeed granted and ceded desert lands to the states conditioned only on the reclamation of the lands by actual settlers. In *State v. Wright,* 44 P. 89 (Mont. 1896) the Court stated:

> . . . . we are satisfied that the law (Carey Act) is valid. The United States had the power to make the offer to the state, to grant it the lands provided the state would reclaim them. Of this there can be no doubt. . . . . We believe the acceptance was valid. The legislature having accepted the offer, its next right, in the premises, was to provide a detailed method whereby the state could execute the acceptance and make it operative. This they have done. The attitude of the state thereby became that of an agent of the United States, to make effective the offer of the latter to part with its desert lands to the state or its assigns, provided the state can reclaim such lands, and induce the actual settlement and cultivation thereof. This the state has undertaken to make possible by legislation. *If the state fails, the United States will not issue its patents. If the state succeeds, the United States has agreed to pass the title to the state, or its assigns, upon satisfactory proofs of the fulfillment of the requirements of the acts of Congress. Id.* at 92. [Emphasis added]

Two years later, in *State v. Marshall,* 52 P. 268 (Mont. 1898) the same court stated:

> . . . . *The general government has by law made to the state conditionally a magnificent donation of lands.* It is of the highest importance that the legislature of the state should make provision by law for performing the conditions upon which the right of the people to acquire the lands thus donated depends. Our legislature, appreciating this important duty to the people, has been prompt in taking the necessary steps and providing the essential means for acquiring title to the arid lands granted, as said above, to the state. *Id.* at 270.[Emphasis added]

The Montana jurists, who were contemporaries of the Congressmen who enacted the Carey Act in 1894, clearly understood that the Carey Act was much more than a mere authorization to the Secretary of the Interior to permit the patent of desert lands if in his sole discretion he decided that such would be in the best interests of the public. They understood and stated that the Carey Act was a conditional grant or donation of public lands to the states, and that once the states complied with the stated conditions, the federal government was obligated to issue patent.

The government claims the presumption against statutory grants of the public domain. However, that argument is balanced in this case by the rule that land grant statutes are not to be construed so as to defeat the intent of the Congress or withhold a grant that is given by necessary or fair implication. In the *United States v. Denver & Rio Grand R. Co.,* 150 U.S. 1 (1893) this Court stated:

> It is undoubtedly, as urged by the plaintiffs error, the well settled rule of the court that public grants

> are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given by fair implication. In *Winona & St. P. R. Co. v. Barney,* 113 U.S. 618, 625 . . . . Mr. Justice Field, speaking for the court, thus states the rule upon this subject: "The acts making the grants are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together. *Id.* at 14.

It has also been held that a land grant statute is to be liberally construed to carry out its purposes. *Great Northern R. Co. v. United States,* 315 U.S. 272 (1942); affirming *McDonald v. United States,* 119 F.2d 821 (9th Cir. 1941).

The language of the Carey Act and the judicial precedent construing that language are both contrary to the position taken by the United States. The grant to the states is clear and absolute and the transfer of title to the states is limited only by the condition that the states comply with the requirements of the Act prior to issuance of patent. None of the opinions support the proposition that the Secretary of the Interior has discretion to arbitrarily deny the Carey Act applications. Once a state has identified desert lands and requested their temporary withdrawal or segregation, the Secretary may not arbitrarily deny the request, but must allow the State to proceed to meet the other requirements of the Act and obtain patent.

D. There is no Long Standing and Consistent Administrative Interpretation of the Carey Act Contrary to the Decisions of the Courts Below.

Petitioner's assertion that the Secretary of the Interior has consistently applied unfettered discretion to decline to enter into contracts under the Carey Act and that such administrative interpretation of the Act is entitled to great deference from the courts is misleading. Actually, the line of department decisions relied upon by Petitioner consists of a single case decided in 1908. That case is not entirely in point. Furthermore, it is well established that the rule of construction applies only to statutes reasonably susceptible of different constructions and that the federal courts are not obligated to follow any administrative decisions that are inconsistent with a statutory mandate or that frustrate Congressional intent. In *Volkswagenwerk v. FMC,* 390 U.S. 261 (1968) this Court stated:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." . . . . But the courts are the final authorities on issues of statutory construction, ... and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." . . . . "The deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia . . . ." (390 U.S. at 272).

See also Houghton v. Payne, 194 U.S. 88, 99 (1904).

The respondent would submit that the statute in question is not reasonably susceptible of different construc-

tions and that any precedent from the decisions of the Department of the Interior are to a large part merely self-serving, inasmuch as the Department has historically attempted to interpret the Carey Act to suit its land development programs and without any express consideration of the rights of the states under the Act. Moreover, examination of Department precedent shows that there is no consistent interpretation of the Act that permits unfettered discretion on the part of the Secretary.

1. *There is only one administrative decision giving limited support to the position of the Secretary of Interior.*

While *State v. Wyoming,* 36 *Pub. Lands Dec.* 394 (1908) does deal with the Carey Act it does not stand for the proposition urged by the Secretary. It does stand for the *limited position* that public lands properly withdrawn prior to the filing of the state's application under the Carey Act are not available to the State and that the Defendant Secretary therefore has authority and discretion to deny such an application. This 1908 administrative decision incorrectly interprets the provisions of the Carey Act and should be disregarded. In any event, the precedent of the decision is limited to those situations in which a *proper withdrawal has been made prior to the Carey Act application.*

A review of the entire body of administrative decisions by the Department of the Interior establishes that the 1908 *State of Wyoming* decision is the only decision holding that the defendant Secretary has any discretion to deny the application by a state for Carey Act lands. There is no authority for any of the following propositions: (1) that the Secretary has discretion to deny Carey

Act applications as to unwithdrawn lands, (2) that the states have no enforceable entitlements, or (3) that the Secretary may arbitrarily refuse to classify desert lands in such a manner as to make them available for Carey Act entry. Contrary to the impression given by the United States, there is almost no precedent within the Department of the Interior dealing with the proper interpretation of the Carey Act and the contractual rights of the states.

Another decision relied upon by Petitioner is *Yakima Development Co. v. Washington,* 34 *Pub. Lands Dec.* 453 (1906). It is not in point. Here the project involved was determined by the Secretary to be not feasible because of the lack of irrigation water and because the state wanted to join the project with a federal reclamation project, assess charges against the lands and use the funds to reclaim other lands. The decision merely holds that when a state's proposal does not meet the requirements of the Carey Act it may be denied. There is no suggestion that the proposal complied with the Carey Act and was denied by the Secretary by reason of discretion. This case illustrates the only type of discretion the Secretary is granted under the Act: administrative discretion to determine whether the statutory requirements of the act have been met. If the requirements are met, then the Secretary must issue patent. *Mollohan v. Gray,* 413 F.2d 349 (9th Cir. 1969).

2. *The regulations of the Department of the Interior support the position of the State of Idaho.*

While the United States has urged that the Secretary has engaged in a long standing practice of exercising "discretion" regarding Carey Act selections, it is interesting to note that the Secretary's regulations did not support this position.

In fact, the *Carey Act Regulations,* 37 *Pub. Lands Dec.* 624 (1909), contain no statements or information of any nature indicating that the Secretary has unlimited discretion to deny a proper application under the Act. To the contrary, the regulations merely recite the provisions of the Act, and specify in detail the information and materials which the states must furnish to comply with the requirements of the Act. The language of the regulations implies that the only function of the Secretary is to make sure that the submittals by the states meet the requirements of the Act: (1) that the land is desert land, and (2) that the irrigation proposal is adequate to irrigate the land. This, in light of the long standing practices of western states, clearly establishes the error of the position of the United States.

II

THE DECISION BELOW DOES NOT PREVENT THE SECRETARY FROM MANAGING PUBLIC LANDS

The government properly recognizes that there is no conflict between the decision below and the decision of any other circuit, and that almost all of the affected public lands lie within the Ninth Circuit. The government has therefore based its petition for a writ of certiorari upon the ground that an important federal question is raised which should be decided by this Court. It attempts to buttress that position by arguing that the decision below will have a severe impact on the Secretary's management of public lands.

The government's argument is insufficient to justify granting certiorari in this case for at least two important reasons. First, the federal question in this case involves the construction of the Carey Act as it pertains to the entitlements of the desert land states to receive public lands. The lands which are affected by the decision lie almost entirely within the Ninth Circuit and, except for the decision in this court in *Idaho Irr. Co. v. Gooding*, 265 U.S. 518 (1923), all of the litigation involving or construing the Carey Act by the federal courts has occurred in the Ninth Circuit. In the absence of conflict between the circuits and in the absence of any showing that the proceedings in the Ninth Circuit have departed from the accepted and usual course of judicial proceedings, there is no reason for this Court to review a case which has been thoroughly and competently decided by the Ninth Circuit in accordance with prior circuit precedent.

Second, the government is incorrect in its argument that the decision below prevents the Secretary from properly administering the public lands. It is true that the decisions of the lower courts provide that the Carey Act and subsequent enactments conferred upon the State of Idaho a right of entitlement to three million acres of desert land suitable for irrigation, cultivation and settlement, which it cannot be deprived of by the Secretary of the Interior if the State meets the conditions of the Carey Act. However, the lower courts expressly recognized that the Secretary was still obligated and empowered to administer the public lands subject to the public land laws and declared that the State of Idaho could not arbitrarily select acreages previously withdrawn for other purposes, without first requesting a

reclassification under public land laws. The district court found that the duties of the Secretary under the Carey Act could be performed in a manner consistent with his obligation to classify and deal with lands in the public interest.

> . . . . the State may not perfunctorily select acreage previously withdrawn for other purposes, such as in this case a withdrawal for stock driveways. The Secretary is under an obligation to preserve enough desert land suitable for Carey Act development to fulfill the State's right of entitlement, which the Federal Government must contract to donate to the State in accordance with the Act. To the extent the land has been withdrawn for other purposes by the Secretary and the State remains desirous of initiating a Carey Act development on such acreage, its remedy is to petition the Secretary to reclassify the lands suitable for Carey Act entry. The Secretary may not arbitrarily deny the State's application for reclassification, withdrawal and Carey Act segregation. . . . . Such a construction of the Carey Act is consistent with 43 U.S.C.A. 315f and its proviso empowering and directing the Secretary to classify the public lands as more valuable or suitable for certain purposes upon application by a qualified applicant. (District Court Memorandum Decision, Petitioner's Brief for Certiorari, Appendix A at 18a-19a.)

To justify the granting of certiorari, the government has raised the specter of all public lands in Idaho and other western states being "frozen" as to use with a resulting administrative burden on the Department of the Interior to classify all lands as to potential use. There is no evidence of any such "freezing" or burden in the record in either court below, and this issue has been raised for the first time to support the government's

petition. The government's claims and fears are not valid. There is no question but that public lands in Idaho will have to be classified as to potential use from time to time, particularly as to their value for agricultural purposes. However, this type of classification is an on-going function and responsibility of the Department of the Interior and will occur regardless of the decision in this case. In fact, the Department of the Interior has itself sharply limited the disposition of public lands in Idaho while it engages currently in an extensive classification of many of the public lands in Idaho.

The decision of the lower courts makes it clear that the Department is entitled to proceed with all such classification programs, and may proceed to make withdrawals and dispositions as required for the public good. Nothing in the decision prevents the Secretary from granting rights under the Desert Land Act or from conveying desert land under the Federal Land Policy and Management Act ("FLPMA"). The only restriction upon the Secretary is that he must preserve enough desert lands in the state of Idaho to meet the requirements of the Carey Act.

The State of Idaho may request segregation of unwithdrawn public lands and may also request reclassification of withdrawn lands. There are well established departmental procedures, with appropriate judicial review, with respect to such reclassification requests. Any conflicts between the entitlement of the State of Idaho to Carey Act lands and the classification and public use of lands by the Department of the Interior under FLPMA can be resolved by administrative and court procedures at the time the conflict arises. The burden is upon the state to ask that the affected lands be reclassified for

Carey Act entry. This will properly focus consideration on the lands and policies involved in the particular case. Such potential disputes are already addressed in the lower court decision and are not a proper ground for granting a writ of certiorari in the instant case. The decision of the district court is not in conflict with the goals of FLPMA but in fact permits exactly the type of classification and development of public lands sought by the government, subject to the protection of the rights of the State of Idaho to receive its Carey Act entitlement.

CONCLUSION

The federal question in this case is confined almost entirely to the Ninth Circuit; there is no conflict between the circuits; and the decision of the lower courts was thorough, competent and correct. The obligation and power of the Secretary of the Interior to administer the public lands was confirmed by this decision. Where conflicts arise between Idaho's Carey Act entitlement and the administration of the public lands, the lower court's decision has established a review procedure. The petition for certiorari should be denied.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this ____ day of September, 1979, three copies of THE STATE OF IDAHO'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI were mailed, postage prepaid, to:

Honorable Wade H. McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

and further that all parties required to be served were served.

DAVID H. LEROY
Attorney General
State of Idaho

APPENDIX A

PERTINENT EXCERPTS FROM THE COMMITTEE REPORTS AND A PORTION OF THE HOUSE DEBATE ON THE CAREY ACT

1. *Report of Secretary of the Interior on Senate Bill 1591, March 2, 1894* (26. Cong. Rec. 8390)

The bill is clear and is guarded in its terms. It is in the interest of small settlers. The United States holds the title until the lands reserved are actually reclaimed and settled. The States will have no power over the land except for the purpose of reclamation and individual settlement, as expressed in the bill, while it will clothe the States with authority ample to induce the reclamation and settlement of the reserved lands, especially by colonies, a system which has worked admirably in several of the States to which the bill will apply . . .

The principal proposition involved, reclamation and settlement by individuals in small holdings, meets my strong approval, and this bill seems to me to present full opportunity for the practical experiment and under proper safeguards. *The United States retains title until reclamation is accomplished and the land occupied by actual settlers. This, if successful, is the great object to be attained;* and if unsuccessful the United States still holds the unencumbered fee. [Emphasis added]

2. *House Debate* (26 Cong. Rec. 8391-92, August 10, 1894)

MR. PICKLER (sponsor of the legislation in the House): Mr. Speaker, I do not care to detain the committee further than to state just what the proposition is that the Senate has placed on this bill. There are between five

and six hundred million acres of Government land not yet taken, consisting largely of arid and desert lands. The question has been discussed in the House for many years past as to the best disposition to make of those lands. Now, this is simply a proposition to donate to each of the States that the desert land laws apply to, a million acres of such lands. Gentlemen will understand that we have between five hundred and six hundred million acres of public domain left, and this simply proposes to appropriate thirteen or fourteen millions of these arid lands, giving 1,000,000 acres to each of the States named.

MR. WILSON of Washington: A million acres of lands.

MR. PICKLER: Yes, a million acres of desert lands.

MR. MERCER: Provided there are a million acres of arid lands within the state.

MR. PICKLER: Yes, these lands are doing nobody any good now, and they never will do anybody any good until they are irrigated. This proposition does not cost the Government anything. It simply allows each of these States to take a million acres of these desert lands and see whether or not, under the direction of the State legislatures, they can be irrigated and reclaimed.

MR. MERCER: Do I understand that the substitute offered by the gentlemen from Arkansas (Mr. McCrae) has been framed by the Land Office? (The substitute offered by McCrae was the House amendment which became the original Carey Act.)

MR. PICKLER: Yes, sir. The proposition that is now before the House is one that has been approved by the Commissioner of the General Land Office and I think there can be no objection to it. Gentlemen will remember

how sensitive this House has shown itself from time to time in regard to making direct appropriations for the irrigation and reclamation of arid lands. Now, here is a proposition which costs the Government nothing, *but simply donates these lands to the States, leaving them to bear the burden of irrigation and reclamation.* Furthermore, it is provided that the title to these lands shall not pass to the States until it is shown to the satisfaction of the Secretary of the Interior that the lands have been reclaimed according to law and the money expended upon them. [Emphasis added].

3. *Excerpts of the Debate on the Act of May 27, 1908,* Ch. 200, § 1, 35 Stat. 347, 43 U.S.C. § 645, which gave the State of Idaho an additional one million acres of Carey Act lands:

House Debate (42 Cong. Rec. 6436, May 16, 1908)

MR. FRENCH . . . . The proposition is simply this: To pass this resolution *will grant to the State of Idaho* an additional 1,000,000 acres to be reclaimed under the terms of the Carey Act, which was passed in 1894. The reason for offering this resolution is this: The State of Idaho has practically exhausted the million acres *granted under that act.* Some of this land has already passed to patent; some of it has been settled and patents are pending in the Department . . . .

MR. WILLIAMS. I desire to ask the gentlemen what is the difference between this bill and the bill which we voted down the other day?

MR. FRENCH. The difference between this bill and the bill that was voted down on Monday is this: That resolution *gave to both the States, Idaho and Wyoming,*

2,000,000 acres of land each. This limits *the grant to Idaho* alone and cuts *the grant* in two, making it a grant of 1,000,000 acres. [Emphasis added].